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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-987

ROY W. WEATHERS,

Petitioner,

—v.—

PAUL EBERT, Commonwealth Attorney
of Prince William County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

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PAUL EBERT, Commonwealth
Attorney of Prince William County,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered on November 13, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, which has not yet been reported, is set forth in the Appendix, infra., p.1 . The order of the District Court for the Eastern District of Virginia dismissing defendant Ebert, which has not been reported, is set forth in the Appendix, infra., p. 10a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on November 13, 1974. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a prosecutor, who is charged with intentionally procuring a second indictment against a person who was acquitted on an identical indictment two weeks earlier, is absolutely immune from a suit for money damage brought under 42 U.S.C. §1983.

STATUTE INVOLVED

42 U.S.C. §1983 provides:

Every person who, under color of

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> any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On June 1, 1970, the Grand Jury of Prince William County returned an indictment charging petitioner Weathers with commission of a felony. On July 23, 1970, petitioner Weathers was acquitted of the felony by the Circuit Court of Prince William County. Less than two weeks later, on August 3, 1970, the Grand Jury of Prince William County returned a second indictment, identical to the first, charging petitioner Weathers with commission of the same felony. App., infra., p. 6a.

Some two and a half years later, on February 25, 1973, petitioner Weathers was arrested at his home by two police officers pursuant to a bench warrant based upon the second grand jury indictment. The police officers searched the petitioner, assaulted him, removed him from his home, and caused him to be imprisoned in the Prince William

County jail for approximately twenty-four hours. App., infra., p. 8a. On May 10, 1973, petitioner Weathers was brought to trial, at which time the Circuit Court granted the prosecutor's nolle prosequi motion and dismissed the indictment. App., infra., pp. 6a-7a.

Thereafter, on October 1, 1973, petitioner Weathers filed a complaint in the United States District Court below seeking damages under 42 U.S.C. §1983 against prosecutor Ebert and three police officers. In that complaint, Weathers alleged the facts set forth above and charged that prosecutor Ebert had procured the second indictment despite the fact that he "knew or should have known that the same grand jury had on June 1, 1970, returned indictment 3778 for the identical offense, on which indictment the plaintiff was acquitted on July 3, 1970." App., infra., p. 6a. Petitioner Weathers charged that prosecutor Ebert's actions violated his constitutional right "not to be put twice in jeopardy of life or limb." App., infra., p. 6a. Weathers also charged that each of the defendants had "acted wilfully, knowingly, and purposefully with the specific intent to deprive Plaintiff of his right to: a) Freedom from illegal seizure of his person, papers, and effects; b) Freedom from unlawful arrest; c) Freedom from illegal detention and imprisonment; d) Freedom from physical abuse, coercion and intimidation." App., infra., p. 8a.

On November 14, 1973, prosecutor Ebert

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filed a motion to dismiss the complaint as to him on the grounds that he was "immune from prosecution for lawful acts arising out of his duty as Commonwealth Attorney." After oral argument on the motion, but without an evidentiary hearing as to the scope of the prosecutor's discretion, the specific responsibilities of the office, or as to all of the circumstances as they reasonably appeared at the time of the actions on which liability was sought, District Judge Albert V. Bryan, Jr., granted Ebert's motion. App., infra., p. 10a.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of prosecutor Ebert on the ground that a prosecutor is absolutely immune from any damage action arising out of acts undertaken in his prosecutorial role.

REASONS FOR GRANTING THE WRIT

The Court of Appeals below conferred absolute immunity upon a prosecutor who was alleged to have intentionally violated petitioner's constitutional rights. That decision stands directly in conflict with Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), cert. denied, 409 U.S. 1029 (1972), which rejected absolute immunity for prosecutors, and with last Term's decision in Scheuer v. Rhodes, 416 U.S. 232 (1974), rejecting absolute immunity for officers of the executive branch of government.

While this Court has not specifically ruled on the scope of prosecutorial immunity in §1983 damage actions, the Court has carefully distinguished between the absolute immunity available to members of the legislative and judicial branches of government, and the qualified immunity applicable to officials of the executive branch. In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court held that principles of common law immunity applied to legislators, thereby absolutely barring §1983 suits for money damages against them for actions taken within their official capacities. And in Pierson v. Ray, 386 U.S. 547 (1967), the Court similarly applied common law immunity to judges acting in their official capacities.

Such immunity, however, has been expressly denied to members of the executive branch of government. In Scheuer v. Rhodes, the immunity available to "the other two branches" was distinguished, 416 U.S. at 241; the "existence of an absolute 'executive immunity'" was rejected, 416 U.S. at 238; and only a qualified immunity "in varying scope" was recognized as "available to officers of the executive branch of government," 416 U.S. at 247. The Court unanimously held that the application of the "qualified immunity" could not be determined upon a barren record on a motion to dismiss, but rather that it was "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247.

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In the instant case, the Court of Appeals affirmed the dismissal of prosecuting attorney Ebert without an evidentiary hearing, despite petitioner's specific allegation that Ebert intentionally procured an indictment against him which was identical to one upon which petitioner had been acquitted two weeks earlier. In affirming the dismissal of Ebert, the Court of Appeals relied on a series of pre-Scheuer cases upholding absolute prosecutorial immunity;[1] attempted to distinguish two pre-Scheuer decisions denying prosecutorial immunity in §1983 damage actions where intentional constitutional deprivations had been alleged;[2] and conveniently disposed of Scheuer by citing it as "dictum," App., infra, pp. 2a - 3a.

1/ Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Madison v. Gerstein, 440 F.2d 338 (5th Cir. 1971); Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966); Phillips v. Nash, 311 F. 2d 513 (7th Cir. 1962). See also the post-Scheuer decision of Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1974). But see, Imbler v. Pachtman, 500 F.2d 1301, 1304 (9th Cir. 1974) (Kilkenny, J. dissenting).

2/ Those two cases, Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), cert. denied, 414 U.S. 1143 (1974) and Hilliard v. Williams, 465 F.2d 1212 (6th Cir.) cert. denied, 409 U.S. 1029 (1972), are discussed infra, at p. 10 - 14.

In Scheuer, the Court pointed out again that:

> "[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 416 U.S. at 236.

In the instant case, petitioner alleged in his complaint that prosecuting attorney Ebert, and other executive officials, intentionally violated his constitutional rights:

> "11. On or about the 3rd day of August, 1970, . . . Ebert acting individually and on behalf of . . . The State of Virginia . . . presented to the Grand Jury of Prince William County, indictment number 3836, which was returned a true bill, in spite of the fact that [he] knew or should have known that the same grand jury had on June 1, 1970, returned indictment 3778 for the identical offense, on which indictment the plaintiff was acquitted on July 23, 1970. . . .
>
> "12. As a direct result of the action of defendants in securing a second indictment of plaintiff for an offense for which he had previously been acquitted and in

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> subsequently arresting plaintiff on that indictment, defendants violated plaintiff's right under the Fifth Amendment . . . not to be put twice in jeopardy of life or limb."

The complaint also alleges that in February, 1973, Weathers was arrested on the second indictment without a valid warrant and was imprisoned in the county jail for more than twenty-four hours. It further alleges:

> "14. In addition each of the defendants, separately and in concert, acted outside the scope of his jurisdiction and without authorization of law . . . wilfully, knowingly, and purposefully with the specific intent to deprive plaintiff of his right to:
>
> a) Freedom from illegal seizure of his person, papers and effects;
>
> b) Freedom from unlawful arrest;
>
> c) Freedom from illegal detention and imprisonment;
>
> d) Freedom from physical abuse, coercion, and intimidation." App., infra, p. 8a .

"Fairly read," this complaint alleges that defendant Ebert, "in undertaking such actions, acted either outside the scope of his . . . office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful

power of office." 416 U.S. at 235. Under Scheuer, petitioner's claim against Ebert cannot be dismissed without an evidentiary assessment of the numerous variables applicable to the "qualified immunity [which] is available to officers of the executive branch." 416 U.S. at 247.

Even without regard to Scheuer, the Fourth Circuit's extension of an absolute immunity for an allegedly intentional deprivation of constitutional rights conflicts with the decisions of four different Courts of Appeals which have denied immunity to prosecutors who have exceeded the scope of their office.

In Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), cert. denied, 414 U.S. 1143 (1974), the Seventh Circuit held that prosecutor Berbling would not be immune in a §1983 damage action if he had exceeded the authority of his office, and remanded the case to allow the plaintiffs to amend their complaint to include such allegations.[3/]

3/ The Court below attempted to distinguish Littleton, citing it as vacated and remanded on other grounds sub nom., Spomer v. Littleton, 414 U.S. 514 (1974), on the grounds that it was concerned with immunity in the context of equitable relief.

The Fourth Circuit's confusion here is somewhat understandable as there were three

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In Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965), the Ninth Circuit held that a prosecutor who allegedly had supervised activities directed toward obtaining a coerced confession had exceeded the scope of his office and hence the scope of his immunity. In Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955), the Fifth Circuit held that a prosecutor who allegedly had coerced a guilty plea had acted outside the scope of his authority and thus could not shelter himself with a claim of immunity. The courts in each of these three cases conceded, however, that immunity was available to the extent that the prosecutor had acted within his "quasi-judicial" functions. In their view, immunity was inapplicable only

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separate defense appeals from Littleton. First, as to equitable relief against the substituted prosecutor, the Court in Spomer remanded for a determination of mootness. Second, as to equitable relief against the judicial defendants, the Court in O'Shea v. Littleton, 414 U.S. 488 (1974), held there was no case or controversy under Article III of the Constitution. Third, as to the availability of damages against prosecutor Berbling, his petition for certiorari was denied as untimely filed, 414 U.S. 1143 (1974). The disposition of this latter petition led the Court in Spomer to note that "[n]o question concerning damage relief is involved in the case presently before us" 414 U.S. at 518-519, n. 5.

where the prosecutor had acted in an investigatory or police role.

This distinction, however, was firmly rejected in Hilliard v. Williams, 465 F.2d 1212 (6th Cir.), cert. denied, 409 U.S. 1029 (1972), a pre-Scheuer case in direct conflict with the instant case. In Hilliard, the Sixth Circuit recognized that the acts complained of were undertaken in the course of the prosecutor's quasi-judicial functions, but the Court refused immunity: "We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." 465 F.2d at 1218.4/

Admittedly, the weight of pre-Scheuer, lower court authority is contrary to Littleton, Robichaud, Lewis and Hilliard.5/ But

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4/ Dissenting in the post-Scheuer case of Imbler v. Pachtman, 500 F.2d 1301, 1304-1306 (9th Cir. 1974), Judge Kilkenny agreed with Hilliard and noted that, in light of Scheuer, it was "time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for intentional misdeeds." 500 F.2d at 1306 (emphasis in original).

5/ See cases cited in note 2, supra. See also cases cited in Littleton v. Berbling, 468 F.2d 389, 409, n. 43 (7th Cir. 1972).

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where an intentional deprivation of constitutional rights is alleged against a member of the executive branch and a defense of immunity is asserted, Scheuer commands an evidentiary determination of the scope of the official's discretion, of the responsibilities of the office, and of all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. 416 U.S. at 247.

Precisely because "the immunity is not absolute but rather is one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence." 416 U.S. at 239. Since an evidentiary hearing is necessary, the plaintiff is "entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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